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2013

# The Varieties of Comparative Institutional Analysis

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### Recommended Citation

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# THE VARIETIES OF COMPARATIVE INSTITUTIONAL ANALYSIS

DANIEL H. COLE\*

“Comparative institutional analysis” (CIA) often is treated as a singular approach to diagnosing and potentially resolving social cost problems (or social dilemmas). In fact, the label represents a *family* of related but importantly different approaches, based on the different conceptions of “institutions,” as well as different processes or functions individual scholars are attempting to describe and explain. This contribution to a *Festschrift* honoring Neil Komesar, the legal scholar most commonly associated with the CIA methodology, begins by highlighting a myriad of definitions of the word “institution,” offers a functional account of alternative definitions of that term, and attempts to demonstrate the utility of alternative approaches to CIA by comparing and contrasting the substantially different, but equally effective, ways it has been employed in the works of Komesar and Elinor Ostrom. The comparison yields a possible approach to reconciling Komesar’s treatment of institutions with that of Ostrom’s fellow Nobel Laureate, Douglass North.

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## INTRODUCTION

The roots of institutional analysis extend as far back as Plato’s *Republic*<sup>1</sup> and Aristotle’s *Politics*.<sup>2</sup> Modern variants of the approach have a common antecedent in the German historical school of the first decade of the twentieth century.<sup>3</sup> However, most institutional analysis has not

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1. See PLATO, *THE REPUBLIC OF PLATO* (Francis MacDonald Cornford trans., Oxford Univ. Press 1945) (n.d.).

2. See ARISTOTLE, *Politica*, in *THE BASIC WORKS OF ARISTOTLE* 1127 (Richard McKeon ed. & trans., Random House 1941) (n.d.).

3. See GUSTAV VON SCHMOLLER, *GRUNDRISS DER ALLGEMEINEN VOLKSWIRTSCHAFTSLEHRE* (1904); Rudolf Richter, *Bridging Old and New Institutional Economics: Gustav Schmoller, the Leader of the Younger German Historical School*,

been comparative in nature. Scholars have often expressed preferences for one institution (or set of institutions) over others, but without any kind of *scientific* metric for comparing the social welfare implications of alternative institutional arrangements.<sup>4</sup> Ronald H. Coase himself criticized the “Old Institutionalists,” including John R. Commons, Thorstein Veblen, and Westley Mitchell, on precisely that ground, noting that they amassed mountains of data, “waiting for a theory, or a fire.”<sup>5</sup> It was Coase who provided the first truly useful metric—transaction costs—for comparing institutions, thereby setting the stage for a “New Institutional Economics.”<sup>6</sup> Alternative institutional arrangements could finally be compared according to a consistent metric to determine which would maximize social welfare (or the social product) by minimizing the costs of transacting.

Even after Coase, as Neil Komesar so often has pointed out, many scholars continued to engage in *single* institutional analysis, sometimes despite claims that they were doing *comparative* institutional analysis (CIA).<sup>7</sup> Harold Demsetz’s famous 1967 article, *Toward a Theory of Property Rights*, is a case in point.<sup>8</sup> He purported to compare

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*Seen with Neoinstitutionalists’ Eyes*, 152 J. INSTITUTIONAL & THEORETICAL ECON. 567 (1996).

4. Of course, scholars often advocated for some institutions over others, but that was often a matter of personal, often ideologically based, preference rather than a legitimate comparison of social welfare outcomes.

5. Ronald H. Coase, *The New Institutional Economics*, 140 J. INSTITUTIONAL & THEORETICAL ECON. 229, 230 (1984) [hereinafter Coase, *New Institutional Economics*]. On the other hand, Coase has also written that “we have less to fear from institutionalists who are not theorists than from theorists who are not institutionalists.” Ronald H. Coase, *The Regulated Industries: Discussion*, 54 AM. ECON. REV. (PAPERS & PROC.) 194, 196 (1964) [hereinafter Coase, *Regulated Industries*]. It has been argued, meanwhile, that Coase overstated the extent to which “Old Institutionalism” lacked a theoretical foundation. See Victor Nee, *The New Institutionalisms in Economics and Sociology*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 49, 50 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005).

6. See R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 2 (1959) [hereinafter Coase, *Federal Communications*]; R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–92 (1937); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 5–6 (1960) [hereinafter Coase, *Problem of Social Cost*]; Coase, *New Institutional Economics*, *supra* note 5, at 230.

7. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 6 (1994).

8. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 354–59 (1967) [hereinafter Demsetz, *Property Rights*]. That Demsetz engaged in single institutional analysis while purporting to engage in comparative institutional analysis is ironic given his strong condemnation (just two years later) of the “nirvana approach,” whereby an existing imperfect institutional arrangement is compared with some “ideal norm.” See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969). His *Toward a Theory of Property Rights* exemplifies perfectly the “nirvana approach.”

common-property regimes and (individual) private property solutions for averting what Garrett Hardin, writing a year later, called the “tragedy of the commons.”<sup>9</sup> Demsetz was trying to explain why it is that the institution of (individual) private property seems to arise in just about every society at some stage in its socioeconomic development. Based on highly unrealistic assumptions about political governance,<sup>10</sup> Demsetz found that effective common-property solutions are impeded by high transaction costs.<sup>11</sup> Therefore, he concluded, (individual) private property becomes socially preferable.<sup>12</sup> Having spent the bulk of the article examining the transaction (or transition) costs of converting pre-existing unregulated common-property systems into regulated common-property systems,<sup>13</sup> including the likelihood of strategic behavior (such as holdouts), Demsetz made no effort to estimate the costs of converting from a common-property regime to a private property regime. A more realistic assessment would have compared the estimated costs (and benefits) of complete privatization with the estimated costs of continued management under an amended common-property regime.<sup>14</sup>

Coase’s truer followers, including Komesar, eschew such simplistic and patently insufficient analyses in favor of the more difficult and complex task of actually *comparing* the costs and benefits of alternative institutional arrangements (including both property rights regimes and regulatory instruments), which really is the only way of avoiding ideology-based nostrums. So, for example, in his book *Law’s Limits*, Komesar criticizes Richard Epstein’s approach to regulatory takings law

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9. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244, 1247–48 (1968); Demsetz, *Property Rights*, *supra* note 8.

10. After studying the history of the emergence of *family* property rights in a Canadian indigenous tribe, Demsetz posits a uniquely democratic tribe, for which any changes to a pre-existing common-property regime that amount to open access for individual members of the tribe must be agreed to by unanimous agreement of all tribe members; any member who does not agree may continue harvesting animal fur under the pre-existing rules. Demsetz, *Property Rights*, *supra* note 8, at 351–54. As a consequence, the transaction costs of transitioning from an unregulated common-property regime to regulated access for tribe members could well be very costly, in part because of strategic behavior driven by market incentives. *Id.* at 355. Even if Demsetz’s assumptions of (1) unregulated access for tribe members under the existing regime and (2) a purely democratic tribe operating pursuant to a rule of unanimous consent for rule changes were not patently unrealistic, that still would not justify his lack of attention to the costs of transitioning from the pre-existing common-property regime to a regime of individual, private ownership.

11. *Id.*

12. *Id.* at 356.

13. *Id.* at 356–59.

14. This is not to say that Demsetz’s arguments about the virtues of private ownership for reducing both negative externalities and transaction costs, compared to alternative property/regulatory solutions are incorrect; it is just that his analysis is insufficient to support that claim.

for failing to adequately consider the costs of greatly expanding access to the courts for aggrieved property owners versus the costs of failing to provide broader judicial remedies. More specifically, Komesar explains that Epstein (1) focuses on the wrong political malfunction, majoritarian bias, when most such takings result (pursuant to theories of collective action)<sup>15</sup> from minoritarian bias, which the “just compensation” clause is not designed to ameliorate;<sup>16</sup> and (2) neglects the supply-side constraints that limit the ability of the judiciary to resolve more than a small fraction of the regulatory takings claims that Epstein’s inclusive definition would generate.<sup>17</sup> Even if “[t]here is much to be said for an expansive vision of the Takings Clause, in general, and of regulatory takings, in particular,” Komesar believes that Epstein’s expansive regulatory takings rule would require a “judiciary so massive that it would alter the basic character of the judiciary,” leading potentially to a political backlash against the courts.<sup>18</sup> Komesar concludes that society, including, ironically, most property owners, might well be better off with the legislative malfunctions than under alternative judicial malfunctions that would likely occur if courts were required more often to intervene between governments and landowners.<sup>19</sup>

Whether or not one agrees (as I do) with Komesar’s conclusion, the great virtue of his approach is obvious: it is not good enough to identify an institutional malfunction (a type of social cost problem) and recommend an alternative institutional solution that may also fail (sometimes for the same reasons). This leads only to an institutional cycling problem as market failures lead to purported government solutions, which then lead to government failures, giving rise to calls for market solutions. It is better to avoid this cycling problem by comparing the expected costs associated with any recommended institutional

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15. See generally NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 181 (2001) [hereinafter KOMESAR, *LAW’S LIMITS*] (discussing the distribution of stakes across a population); MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (proposing rational individuals will not advance common group goals at the expense of personal welfare unless coerced to do so); KOMESAR, *supra* note 7, at 8 (discussing the distribution of stakes across a population).

16. KOMESAR, *LAW’S LIMITS*, *supra* note 15, at 94–95. In such cases, just compensation merely spreads the costs among taxpayers rather than focusing the costs on the beneficiaries of the expropriation. As a consequence, it actually exacerbates existing incentives for interest groups to engage in rent-seeking activity via government expropriations.

17. *Id.* at 91, 94–95.

18. *Id.* at 91, 99.

19. *Id.* at 106. For evidence that Komesar’s relative trust in the political process as the least bad solution may be well placed, see, for example, Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141 (2007).

solution with the observed costs of the alleged institutional failure. Komesar's recommendation of CIA is a direct outgrowth of Coase's injunction against the presumption that market failures automatically warrant government intervention because we must also account for the costs of likely government failures.<sup>20</sup>

Institutional analysis generally, and CIA in particular, are taught and used not only by scholars in law and economics but across the social sciences,<sup>21</sup> which creates exciting interdisciplinary possibilities but also significant difficulties, as variable meanings become attached to words like "institution" and "organization" (among others).<sup>22</sup> This Article is about the already wide diversity of approaches to comparative institutional analysis across disciplines, and the increasing need for a common thesaurus (rather than a common dictionary) for cross-disciplinary communication and learning about institutions and their social-ecological consequences.

Part I of this Article examines the numerous ways in which CIA is actually deployed across disciplines, with special attention to differential definitions of common terms. Neil Komesar's approach and definitions will be compared with those of other social scientists, including Ronald Coase, Douglass North, and Elinor Ostrom. Part II then focuses on alternative approaches to CIA offered by Komesar and Ostrom not so much to establish that one approach is preferable to another, but to demonstrate that lack of complete agreement on vocabulary and analytical variables is not an insufferable problem. As we shall see, different definitions of common concepts, such as "institution," seem to be selected largely for *functional* reasons,<sup>23</sup> based on the specific types of questions a particular analyst is trying to understand and explain. However, the use of variable definitions can create misunderstandings and impede effective communication if scholars are less than clear about how they define terms relative to the wider, cross-disciplinary literature. The bottom line of this Article is that CIA is a very powerful, indeed crucial, tool for policy making for social welfare,<sup>24</sup> but one characterized

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20. Coase, *Regulated Industries*, *supra* note 5, at 194–95.

21. See generally W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS: IDEAS AND INTERESTS (3d ed. 2008) (presenting similarities and differences of institutional theories).

22. This is a point I made in an earlier review essay of Neil Komesar's book, *Law's Limits*. See Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on Law's Limits*, 29 LAW & SOC. INQUIRY 261, 263–64 (2004).

23. Komesar admits a functional reason for his own definition of "institution." KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 7, at 9. And, as we shall see, other scholars' definitions seem chosen to serve similarly functional purposes. See *infra* notes 26–44 and accompanying text.

24. Even if one is not persuaded to go along with the somewhat extreme institutional determinism of DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS

by great variation in design and use across the social sciences, and those (largely functional) variations must be appreciated across disciplines in order to maximize the tool's value.

#### I. THE WORKING PARTS OF COMPARATIVE INSTITUTIONAL ANALYSIS

In this Part, I address how approaches to CIA differ across scholars and across disciplines. Two elements are central to the variation we see in CIAs: (1) definitions of terms, such as “institution” and “organization,” which determine the focus or scope of analysis; and (2) the evaluative criteria used to compare alternative institutions or sets of institutions.

Before one can engage in any form of CIA, one must define (if only implicitly) what is meant by an “institution.” Despite the fact that institutional analysis (comparative or otherwise) has been with us for a very long time—the term “institution” reportedly was first used by Giambattista Vico in his 1725 book *Scienza Nuova*<sup>25</sup>—surprisingly little agreement exists on the meaning of that rather ordinary-seeming term. In fact, “institution” seems to have nearly as many definitions as definers. Sometimes, the term is defined only implicitly. More problematically for interdisciplinary understanding, some definitions are not compatible with others. Here is a fairly representative sample (in no particular order) from various social-scientific literatures.

*Neil Komesar (law):*

Institutions for me are large-scale social decision-making processes—markets, communities, political processes, and courts. I use the choice among these institutional processes to clarify basic issues such as the roles of regulation, rights, governments, and capitalism. These processes are alternative mechanisms by which societies carry out their goals.<sup>26</sup>

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FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (2012), no one today would argue that institutions are anything less than very important contributing factors to social welfare.

25. Geoffrey M. Hodgson, *What Are Institutions?*, 40 J. ECON. ISSUES 1, 1 (2006).

26. KOMESAR, LAW'S LIMITS, *supra* note 15, at 31. Komesar is, by his own admission, not entirely consistent in his treatment of organizations as institutions. *Id.* For example, he concedes that for functional reasons he treats some organizations, such as labor unions and corporations, as actors rather than institutions, while acknowledging that they might be, and sometimes are, treated under his rubric as institutions. KOMESAR, *supra* note 7, at 10. This would have been problematic, had Komesar not been clear at the outset about what he was including and what he was excluding from his CIA. Even so, he

*Ronald Coase (economics):*

Contemplation of an optimal system may suggest ways of improving the system . . . [and] it may go far to providing a solution. But in general its influence has been pernicious. It has directed economists' attention away from the main question, which is how alternative arrangements will actually work in practice. . . . Until we realize that we are choosing between social arrangements which are all more or less failures, we are not likely to make much headway. . . . The kind of question which usually has to be decided is, for example, whether the administrative structure of an agency should be changed or a certain provision in a statute amended. That is to say, what we are normally concerned with are social arrangements and what is economically relevant is how the allocation and use of factors of production will change with a change in social arrangements.<sup>27</sup>

*Douglass North (economics):*

Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change.<sup>28</sup>

*Gustav von Schmoller (economics):*

"[A] partial order for community life which serves specific purposes and which has the capacity to undergo further evolution independently. It offers a firm basis for shaping social actions over long periods of time; as for example property, slavery, serfhood (sic), marriage, guardianship, market system, coinage system, freedom of trade."

. . . .

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might have usefully offered a more definite, consistent analytical basis for determining when organizations should be included versus excluded from the term "institution."

27. Coase, *Regulated Industries*, *supra* note 5, at 195.

28. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).



[Organizations, then,] are the personal side of the institution.<sup>29</sup>

*Vincent Ostrom (political science):*

“[I]nstitutions are defined as systems of rule-ordered relationships,”<sup>30</sup> where “[r]ules are linguistic structures that enable human beings to distinguish the realm of all possible actions into those that are prohibited, permitted, and required.... Rules thus establish constraints that allow for predictability in human relationships, while leaving open a range of possibilities to take account of other calculations that impinge on human welfare.”<sup>31</sup>

*Elinor Ostrom (political science):*

Broadly defined, institutions are the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighborhoods, markets, firms, sports leagues, churches, private associations, and governments at all scales.

....

The opportunities and constraints individuals face in any particular situation, the information they obtain, the benefits they obtain or are excluded from, and how they reason about the situation are all affected by the rules or absence of rules that structure the situation.<sup>32</sup>

*Susan Crawford and Elinor Ostrom (political science):*

We use the broad term *institutional statement* to . . . refer[] to a shared linguistic constraint or opportunity that prescribes, permits, or advises actions or outcomes for actors (both individual and corporate). Institutional statements are spoken, written, or tacitly understood in a form intelligible to actors in an empirical setting. In theoretical analyses, institutional

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29. EIRIK FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS 6, 7 (1998) (quoting VON SCHMOLLER, *supra* note 3, at 61).

30. VINCENT OSTROM, *Conceptualizing the Nature and Magnitude of the Task of Institutional Analysis and Development*, in 2 THE QUEST TO UNDERSTAND HUMAN AFFAIRS: ESSAYS ON COLLECTIVE, CONSTITUTIONAL, AND EPISTEMIC CHOICE 181, 191 (Barbara Allen ed., 2012).

31. *Id.* at 190.

32. ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 3 (2005).

statements will often be interpretations or abstractions of empirical constraints and opportunities.<sup>33</sup>

*Elinor Ostrom (political science):*

“Institutions” can be defined as the set of working rules that are used to determine who is eligible to make decisions in some arena, what actions are allowed or constrained, what aggregation rules will be used, what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned to individuals dependent on their actions. All rules contain prescriptions that forbid, permit, or require some action or outcome. Working rules are those actually used, monitored, and enforced when individuals make choices about the actions they will take.<sup>34</sup>

*Thorstein Veblen (economics):*

[M]en order their lives by . . . principles and, practically, entertain no question of their stability and finality. That is what is meant by calling them institutions; they are settled habits of thought common to the generality of men.<sup>35</sup>

[An institution is] a usage which has become axiomatic and indispensable by habituation and general acceptance.<sup>36</sup>

*C. Reinold Noyes (economics):*

[T]he arrangements, the practices and the rules of society . . . .<sup>37</sup>

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33. Sue E.S. Crawford & Elinor Ostrom, *A Grammar of Institutions*, 89 AM. POL. SCI. REV. 582, 583 (1995) (citation omitted). Crawford and Ostrom adopt this broad definition of “institutional statement” to encompass all three of the general approaches they find in the literature: institutions as equilibria, institutions as norms, and institutions as rules. *Id.*

34. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 51 (1990) (citations omitted).

35. THORSTEIN VEBLEN, THE PLACE OF SCIENCE IN MODERN CIVILIZATION AND OTHER ESSAYS 239 (1919).

36. THORSTEIN VEBLEN, ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES: THE CASE OF AMERICA 101 n.1 (1967); see also William T. Waller, Jr., *The Evolution of the Veblenian Dichotomy: Veblen, Hamilton, Ayres, and Foster*, 16 J. ECON. ISSUES 757, 759 (1982).

*Walter Hamilton (economics):*

[I]nstitution] is a verbal symbol which for want of a better describes a cluster of social usages. It connotes a way of thought or action of some prevalence and permanence, which is embedded in the habits of a group or the customs of a people. In ordinary speech it is another word for procedure, convention, or arrangement; in the language of books it is the singular of which the mores or the folkways are the plural. Institutions fix the confines of and impose form upon the activities of human beings. The world of use and wont, to which imperfectly we accommodate our lives, is a tangled and unbroken web of institutions.<sup>38</sup>

*Geoffrey M. Hodgson (economics):*

[W]e may define *institutions* as systems of established and prevalent social rules that structure social interactions. Language, money, law, systems of weights and measures, table manners, and firms (and other organizations) are thus all institutions.<sup>39</sup>

*Masahiko Aoki (economics):*

An institution is a self-sustaining system of shared beliefs about how the game is played. Its substance is a compressed representation of the salient, invariant features of an equilibrium path, perceived by almost all the agents in the domain as relevant to their own strategic choices. As such it governs the strategic interactions of the agents in a self-enforcing manner and in turn is reproduced by their actual choices in a continually changing environment.<sup>40</sup>

*Randall Calvert (political science):*

[T]here is, strictly speaking, no separate animal that we can identify as an institution. There is only rational behavior,

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37. C. REINOLD NOYES, *THE INSTITUTION OF PROPERTY: A STUDY OF THE DEVELOPMENT, SUBSTANCE, AND ARRANGEMENT OF THE SYSTEM OF PROPERTY IN MODERN ANGLO-AMERICAN LAW* 2 (1936).

38. Walter H. Hamilton, *Institution*, in 8 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 84, 84 (Edwin R. A. Seligman & Alvin Johnson eds., 1932).

39. Hodgson, *supra* note 25, at 2 (citation omitted).

40. MASAHIKO AOKI, *TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS* 26 (2001).

conditioned on expectations about the behavior and reactions of others. When these expectations about others' behavior take on a particularly clear and concrete form across individuals, when they apply to situations that recur over a long period of time, and especially when they involve highly variegated and specific expectations about the different roles of different actors in determining what actions others should take, we often collect these expectations and strategies under the heading *institution*.<sup>41</sup>

*Everett C. Hughes (sociology):*

(1) a set of mores or formal rules, or both, which can be fulfilled only by (2) people acting collectively, in established complementary capacities or offices. The first element represents consistency; the second concert or organization.<sup>42</sup>

*A. Allan Schmid (economics):*

Institutions are human relationships that structure opportunities via constraints and enablement. A constraint on one person is opportunity for another. Institutions enable individuals to do what they cannot do alone. They structure incentives used in calculating individual advantage. They also affect beliefs and preferences and provide cues to uncalculated action. They provide order and predictability to human interaction.<sup>43</sup>

*W. Richard Scott (sociology):*

Institutions are comprised of regulative, normative and cultural-cognitive elements that, together with associated activities and resources, provide stability and meaning to social life.<sup>44</sup>

This is not the place for a detailed parsing of these various definitions of "institution" (a comparative analysis of "institutions," if you will), but several points of differentiation are worth exploring. First,

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41. Randall L. Calvert, *Rational Actors, Equilibrium, and Social Institutions*, in *EXPLAINING SOCIAL INSTITUTIONS* 57, 73–74 (Jack Knight & Itai Sened eds., 1995).

42. Everett Cherrington Hughes, *Institutions*, in *AN OUTLINE OF THE PRINCIPLES OF SOCIOLOGY* 283, 287 (Robert E. Park ed., 1939) (emphasis omitted).

43. A. ALLAN SCHMID, *CONFLICT AND COOPERATION: INSTITUTIONAL AND BEHAVIORAL ECONOMICS* 1 (2004).

44. SCOTT, *supra* note 21, at 48.

observe that some social scientists writing about “institutions,” for instance Elinor Ostrom, have adopted multiple definitions. She defined the term somewhat differently in works she wrote at different times and to different ends.<sup>45</sup> However, as I explain later in this Article, Ostrom’s various definitions, properly understood, are mutually compatible, and also are compatible with Douglass North’s consistent and strict definition of the term. The apparent differences among them are explained by the different *functions* she intended the term to serve within the specific analysis.

Important differences among several definitions of “institution” can be dichotomized along one or both of two dimensions: inclusive versus exclusive (of organizations) and static versus dynamic.<sup>46</sup>

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45. See *supra* notes 32–34 and accompanying text.

46. Because some listed authors are not entirely clear about these issues, not all authors are listed on one side or the other of each dichotomy. The static versus dynamic dichotomy may be partially vitiated by the recognition of some proponents of a dynamic approach to institutional analysis, such as North, that some institutions, most notably deep-rooted informal institutions, are very slow and difficult to change because of path dependencies, vested interests, and other reasons. See generally NORTH, *supra* note 28 (illustrating and explaining the reasons for incremental institutional change).

TABLE 1  
INCLUSIVE VERSUS EXCLUSIVE DEFINITIONS

“Institutions” Includes Organizations	“Institutions” Excludes Organizations
<ul style="list-style-type: none"> <li>• Komesar</li> <li>• Coase</li> <li>• von Schmoller</li> <li>• Veblen</li> <li>• Noyes</li> <li>• Hamilton</li> <li>• Hodgson</li> <li>• Hughes</li> <li>• Scott</li> <li>• Calvert</li> </ul>	<ul style="list-style-type: none"> <li>• North</li> <li>• V. Ostrom</li> <li>• E. Ostrom</li> <li>• Veblen</li> <li>• Aoki</li> <li>• Schmidt</li> </ul>

TABLE 2  
STATIC VERSUS DYNAMIC DEFINITIONS

“Institutions” Are Completely Static/Immutable	“Institutions” Are Substantially Dynamic
<ul style="list-style-type: none"> <li>• Veblen</li> <li>• Hamilton</li> </ul>	<ul style="list-style-type: none"> <li>• Komesar</li> <li>• Coase</li> <li>• North</li> <li>• von Schmoller</li> <li>• V. Ostrom</li> <li>• E. Ostrom</li> <li>• Noyes</li> <li>• Hodgson</li> <li>• Aoki</li> <li>• Schmidt</li> <li>• Calvert</li> </ul>

Another obvious point of differentiation concerns the relative influence of alternative definitions across the social-scientific literatures. Douglass North’s seems to be the one most often mentioned throughout the social sciences, though this remains an untested hypothesis; if true, it is ironic because North’s definition deviates perhaps more than any other from accepted usages of “institutions” in common parlance. For example, North happens to be a Senior Fellow at the “Hoover Institution,”<sup>47</sup> which in his vocabulary is not an institution at all but an

47. Douglass C. North, HOOVER INST., <http://www.hoover.org/fellows/10069> (last visited Jan. 18, 2013).

organization. To him (and to other scholars who exclude organizations from their definitions of “institution”), organizations like the Hoover Institution are “groups of individuals bound together by some common purpose to achieve objectives.”<sup>48</sup> As such, they operate pursuant to their own set of institutions (corporate bylaws, organizational rules and norms, church doctrine, etc.), and are strongly influenced by external societal institutions, including both formal laws and informal social norms. As actors in a wider society, organizations, in turn, may influence that society’s institutional choices.

If North’s use of the term is the most prevalent (or, at least, the most often cited among social scientists), even his fellow “New Institutionalists” often deviate from it, as evidenced by the definitions from Coase and Aoki.<sup>49</sup> Coase, in fact, does not even use the term “institution,” let alone the phrase “comparative institutional analysis,” despite his well-deserved reputation for (1) providing a useful metric for making institutional comparisons and (2) calling for comparative analyses of alternative “social arrangements.”<sup>50</sup> Coase’s use of the phrase “social arrangements” implies a concern with choice of both rules and organizational structures. He observes that we can change the structure of an organization (such as a government agency), the rules under which it operates, or both.<sup>51</sup> Similarly, Komesar’s focus on legal decision-making processes, including voluntary market contracting, legislative enactments (via political processes at various levels of government), and judicial rulings, implies a strong interest in organizational choice.

Once a scholar has settled on a definition of “institutions” to serve her or his purpose(s), the next major decision is to adopt a criterion or criteria for comparison. Alternatives include (but might not be limited to): (1) subjective value judgments based on ideological commitments or beliefs; (2) net social welfare comparisons incorporating Coasean transaction-cost analysis; (3) a Rawlsian “maximin” principle; (4) Amartya Sen’s “capability approach;” or (5) net maximization of Harold Lasswell’s eight “value terms” (including power, enlightenment, wealth,

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48. See NORTH, *supra* note 28, at 5.

49. See *supra* notes 27, 40 and accompanying text. Another case in point: North’s student Avner Greif incorporates organizations as part and parcel of his institutional analysis. See AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 29 (2006).

50. See Coase, *Federal Communications*, *supra* note 6; Coase, *Problem of Social Cost*, *supra* note 6; Coase, *Regulated Industries*, *supra* note 5.

51. See Coase, *Regulated Industries*, *supra* note 5, at 194.

well-being, skill, affection, respect, and rectitude).<sup>52</sup> Both (3) and (4) point in the direction of preferring institutions (or sets of institutions) that relieve poverty, thereby increasing social opportunities for the worst-off in society (which might not necessarily be inconsistent with social welfare maximization).<sup>53</sup> Among the first generation of Old Institutionalists and many self-described libertarians, the first evaluative criterion generally seems (to me at least) to be most common (which is not to say that those who prefer the second or third criteria are devoid of ideological bias—no one is). Among New Institutionalists who engage in *real* CIA, the overwhelming majority adopt a social-welfare approach, which requires attention to the likely *effects* of alternative institutional arrangements on the costs of transacting (among other costs, possibly including “demoralization costs” arising from institutional arrangements that reduce incentives to undertake productive investments<sup>54</sup>).<sup>55</sup> At least one New Institutionalist, Elinor Ostrom, has cited Lasswell as an important influence.<sup>56</sup>

The differences in definitions of the objects of analysis (institutions) and the existence of alternative evaluative criteria might suggest that CIA is not a single analytical approach but a family of approaches with points of similarity and points of difference, which might or might not be in need of standardization. However, the following Part argues for a *functionalist* explanation of alternative definitions of “institution,” according to which preferred definitions depend on the specific rule choices and/or organizational choices the scholar is attempting to understand and explain within his or her analytical framework. On this view, the plurality of definitions of “institution” is not a problem in and of itself, except to the extent it can impede communication between scholars who use the term differently.

The problem of varying evaluative criteria is, I suppose, less problematic. To the extent conclusions are based on ideological priors,

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52. HAROLD D. LASSWELL, A PRE-VIEW OF POLICY SCIENCES 18 (1971); 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 377 (1992).

53. See MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH (2011); JOHN RAWLS, A THEORY OF JUSTICE 152–54 (1971); AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985).

54. On “demoralization costs,” see Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214–16 (1967).

55. E.g., ACEMOGLU & ROBINSON, *supra* note 24; KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 7, at 105–09; KOMESAR, LAW’S LIMITS, *supra* note 15, at 15–16, 20–21; NORTH, *supra* note 28; Cole, *supra* note 19.

56. Elinor Ostrom, *The Ten Most Important Books*, 4 TIDSSKRIFTET POLITIK 36 (2004); see also Matthew Auer, *Contexts, Multiple Methods, and Values in the Study of Common-Pool Resources*, 25 J. POL’Y ANALYSIS & MGMT. 215, 225 (2006).



outcomes of analyses are essentially predetermined and actual comparisons otiose. Evaluative criteria that offer potentially practicable measures of consequences, such as some approach to maximizing a social-welfare function or some other values, whether those of Rawls, Sen, or Lasswell, are to be preferred; it seems reasonable that different scholars might prefer different measures.<sup>57</sup> All we can reasonably demand is that scholars be as clear as possible not only about their definitions of key concepts, such as “institution” and “organization,” but also about the evaluative criteria they are using to compare outcomes under alternative institutional arrangements.

## II. THE MULTIPLE FUNCTIONS OF COMPARATIVE INSTITUTIONAL ANALYSIS

This Part compares Neil Komesar’s approach to CIA with that of the late Elinor Ostrom. The purpose is not to suggest that one’s approach is superior to that of the other, but only to explain that both approaches are legitimate, given the social dilemmas (or social-cost problems) each scholar is attempting to understand and explain, and to illustrate the alternative kinds of approaches and assessments that CIA generally permits.

In his book *Imperfect Alternatives*, Komesar unapologetically offers a functional explanation of his approach to CIA:

Although, for the purposes of this book, I lump institutions together into three general categories, market, political, and adjudicative, there is no magic about these categories. Institutions can be defined and aggregated in any number of ways *depending on the focus for study*. The categories are a compromise between conflicting analytical objectives—my desire to show the broad spectrum of institutional choice and my desire to examine law-related issues.<sup>58</sup>

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57. But see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002) (claiming that any approach focusing on equity or fairness in distribution, as a maximand independent of social welfare, logically entails a commitment to policies that would make everyone in society worse off). Following John Stuart Mill, who directly connected notions of justice and utility, Kaplow and Shavell argue that distributional concerns can be, and are most appropriately, subsumed within a more general social welfare-based analysis. *Id.* After all, individuals express a “taste for . . . fairness.” *Id.* at 21; see also JOHN STUART MILL, *UTILITARIANISM* ch. 5 (George Sher ed., Hackett Publ’g Co. 1979) (1863).

58. KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 7, at 9 (emphasis added).

The starting point for Komesar's CIA is found in Coase's 1964 discussion,<sup>59</sup> which argued for equal attention to both government failures and market failures, in recognition that all of our available mechanisms for resolving social-cost problems are likely to fail, to greater or lesser extents, in any particular set of circumstances.<sup>60</sup> Consequently, our *normative* goal in making institutional choices should be to choose those social arrangements that, in the circumstances, are either least likely to fail or likely to fail the least. This is, in short, the basis for all of Komesar's assessments comparing market, legislative, and judicial allocations of entitlements to resources. His CIA is, in essence, Coase's CIA, but applied to a somewhat different institutional-choice set; they both include some organizations in their definitions of "institution," but they are concerned with different sets of organizations (or decision-making processes). For Coase, the focus of attention is on market versus firm versus government, by which he means primarily legislative and administrative determinations of allocations. For Komesar, the relevant choice set is markets (including firms, in contrast to Coase), legislative bodies, and courts.

Komesar's approach to "institutional" choice (others scholars might well label it "organizational" choice) is decidedly Coasean.<sup>61</sup> He compares and contrasts markets, courts, and legislative bodies for resolving various kinds of legal/social-cost conflicts (but with a relatively heavier focus on courts), and reaches some surprising conclusions. For example, as noted earlier, Komesar's CIA of the judicial doctrine of regulatory takings law in *Law's Limits* leads him to conclude that the game may not be worth the candle largely because of supply-side constraints (numbers of judges and courtrooms) and remedy-related problems. Specifically, "just compensation" is not an appropriate remedy in cases where takings result from minoritarian dysfunctions, that is, interest-group pressure, rather than majoritarian bias, because it allocates costs to the wrong group of people and compounds incentive problems that result in too many expropriations.<sup>62</sup> Consequently, he expects that the legislative process may be the best hope private property owners have, even if legislatures are also primarily responsible for the problem in the first place.<sup>63</sup>

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59. See Coase, *Regulated Industries*, *supra* note 5.

60. See *id.*

61. By "Coasean," I refer to Coase's real concern with production and allocation of entitlements to resources in the real world of positive transaction costs, as opposed to the mythical world of what George Stigler (mis)labeled the "Coase theorem." See RONALD H. COASE, *Notes on the Problem of Social Cost*, in *THE FIRM THE MARKET AND THE LAW* 157 (1988); Coase, *Problem of Social Cost*, *supra* note 6, at 15–44.

62. See *supra* note 15 and accompanying text.

63. *Id.*

More generally, Komesar's approach to CIA has taught us a number of useful lessons about the nature, scope, and direction of institutional/organizational malfunction, including the important and insightful observation that institutions tend to "fail together," by which he means that markets, legislative bodies, and courts often fail at the same time and for the same reasons (if not to the same extent).<sup>64</sup>

While Komesar includes some (but not all)<sup>65</sup> organizations in his definition of "institutions," Elinor Ostrom seems to exclude them entirely from her definition. As noted earlier, Ostrom specified several definitions of "institutions" in constructing an elaborate system (replete with grammars, syntax, frameworks, theories, and models) for diagnosing, analyzing, and resolving social dilemmas (or social-cost problems).<sup>66</sup> In one definition, she focused on the "institutional statement" as a "shared linguistic constraint or opportunity."<sup>67</sup> In two others, she adopted *operational* (as opposed to linguistic) definitions of "institution," both of which are variants of North's conception<sup>68</sup>: (1) the "working rules" that forbid, permit, or require actions by some actor or group of actors (e.g., an organization) and (2) "prescriptions" that structure social interactions.<sup>69</sup> Ostrom's various definitions are not at all inconsistent; they reflect various functions the term "institutions" served for Ostrom in different analytical and grammatical settings.

Ostrom and coauthor Sue Crawford adopted the linguistic definition ("institutional statement") in an attempt to construct an internally consistent *grammar* for institutional analysis that could be used across disciplines. The "working rules" definition was specified in Ostrom's most comprehensive exegesis of her Institutional Analysis and Development (IAD) framework.<sup>70</sup> And the definition of "institutions" as "prescriptions," which is hardly distinguishable from "institutions" as "working rules," appears in *Governing the Commons*, where she examined common property regimes as institutional solutions to actual common-pool resource problems.<sup>71</sup> Each of the three definitions of "institution" is connected inextricably to Ostrom's IAD framework. Thus, we need to understand something of her IAD framework to appreciate her functional preference for a definition of "institutions," which excludes organizations from its ambit.

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64. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 7, at 23.

65. *See id.* at 9–10.

66. *See supra* notes 32–34 and accompanying text.

67. *See* Crawford & Ostrom, *supra* note 33.

68. Indeed, Elinor Ostrom quoted and explicitly embraced North's definition of "institutions." OSTROM, *supra* note 32, at 179.

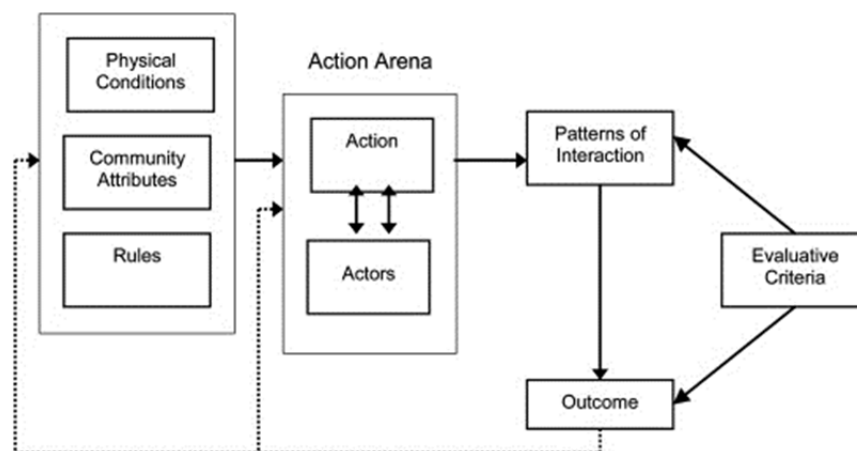
69. *See supra* notes 32–34 and accompanying text.

70. *See* OSTROM, *supra* note 32.

71. *See* OSTROM, *supra* note 34.

The conventional IAD framework is described by the following Chart<sup>72</sup>:

CHART 1  
CONVENTIONAL IAD FRAMEWORK



The focal unit of analysis is the “action arena” (Ostrom came to prefer the label “action situation,” which she used in the context of the subsequently developed Social-Ecological Systems (SES) framework)<sup>73</sup> in which collective (cooperative or noncooperative) decisions are made, resulting (or not) in collective action. Utilizing a structural system she derived together with her husband Vincent,<sup>74</sup> depicted in Chart 2 below,<sup>75</sup> action arenas arise at three different levels of social choice: (1) the constitutional-choice level at which the meta-rules of the game (the rules for making rules) are chosen; (2) the collective-choice level at which the operating rules of the game are specified in accordance with the

72. ELINOR OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES* 37 (1994). A slightly revised version of the same figure appears in Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 646 (2010).

73. See, e.g., Elinor Ostrom, *A General Framework for Analyzing Sustainability of Social-Ecological Systems*, 325 SCI. 419 (2009).

74. See Larry L. Kiser & Elinor Ostrom, *The Three Worlds of Action: A Metatheoretical Synthesis of Institutional Approaches*, in STRATEGIES OF POLITICAL INQUIRY 179–80 authors’ n. (Elinor Ostrom ed., 1982); Vincent Ostrom & Elinor Ostrom, *Public Choice: A Different Approach to the Study of Public Administration*, 31 PUB. ADMIN. REV. 203, 211–12 (1971). For an application of the “three worlds of action,” see OSTROM, *supra* note 34, at 52.

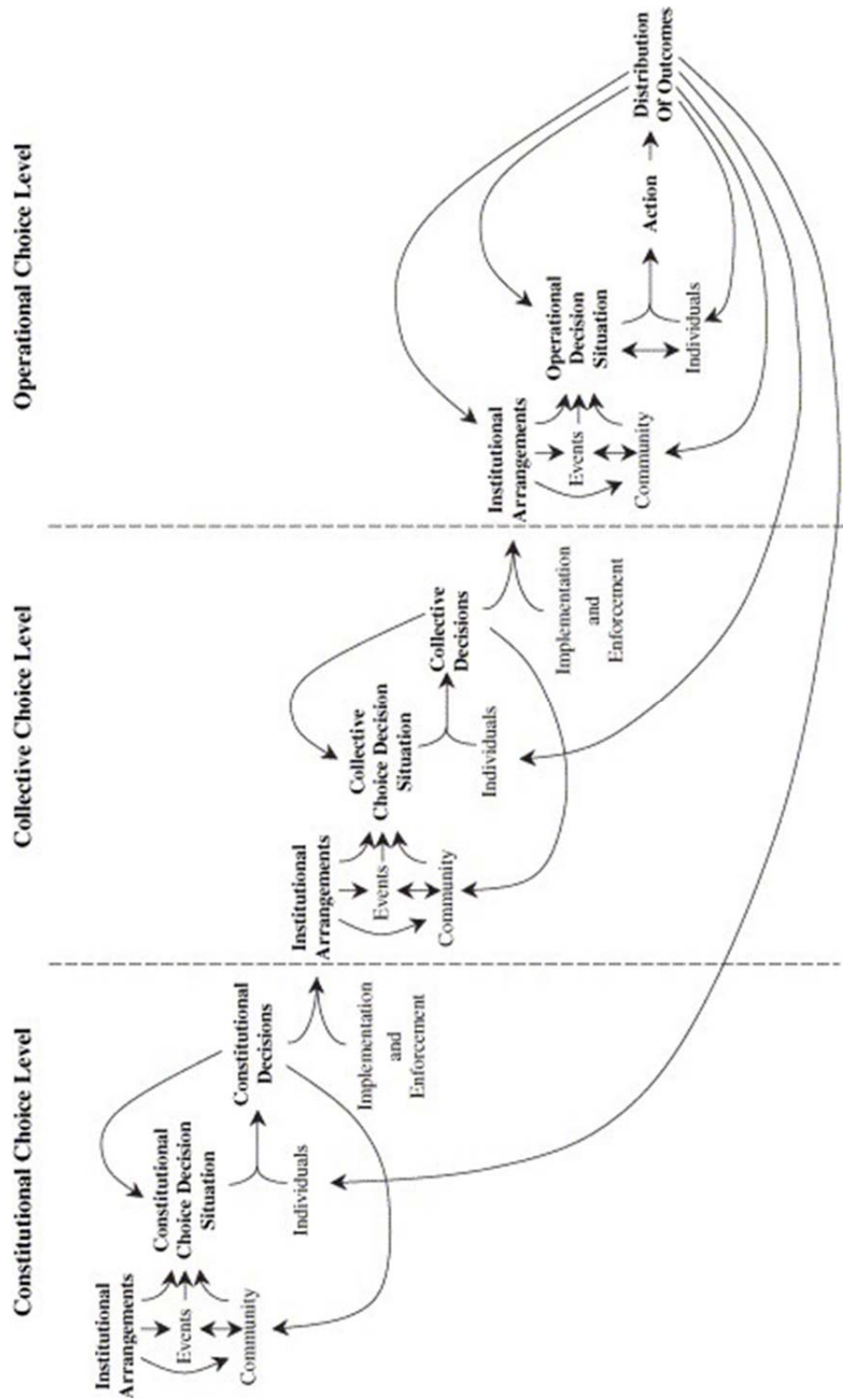
75. Paul A. Sabatier, *Toward Better Theories of the Policy Process*, 24 PS: POL. SCI. & POL. 147, 152 fig.2 (1991).

meta-rules established at the constitutional-choice level; and (3) the operational level, where social interactions allocate entitlements to resources and result in (or fail to result in) collective action on social dilemmas (or social-cost problems) in accordance with the social “prescriptions” or “rules” established at the collective-choice and constitutional-choice levels.<sup>76</sup>

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76. *Id.* at 151.

CHART 2: LEVELS OF SOCIAL CHOICE



At the operational level, an action arena may be a market, a court, a media outlet, a legislative chamber, a tribal council, a neighborhood meetinghouse, a church, a virtual locus in cyberspace, or a home. At the constitutional- and collective-choice levels, the set of action arenas usually excludes markets (although political arenas are often described by public choice scholars as markets),<sup>77</sup> but includes a wide variety of other forums. Collective-choice level action arenas include Congress (for all imaginable purposes, it is better described as an action arena, in which the relevant actors are legislators, rather than as an actor itself or as an organization for that matter),<sup>78</sup> the respective houses of Congress, legislative committees within each of those houses (wherein actors are committee chairs, members, representatives of groups appearing before them, etc.), party caucuses, parallel arenas at state and local levels of government, and corporate and club boardrooms. At the constitutional level, action arenas include (but are not necessarily limited to): Congress, state legislative bodies, constitutional conventions, ratifying conventions, town halls, and meetings at which articles of incorporation or corporate bylaws are debated and adopted.

In any given action arena (or situation), participants (the actors) are influenced (or incentivized) by many variables, including the biophysical attributes of the resources (relative scarcity, boundary conditions, rivalrousness of use, excludability, etc.) about which they are making decisions; the attributes of their own community (e.g., population size and relative homo- versus hetero-geneity, and various *positions* held by different actors), and the collective-choice rules in use (that is, rules that are actually enforced within the action arena). The outcomes of social interactions, along with evaluations of those outcomes by social actors, subsequently feed back into the variables that affect decision making. So, failure to resolve a certain collective action problem, such as conservation of a common-pool resource, in the relevant action arena will impact on the biophysical attributes of that resource. And, if that outcome is evaluated to be bad, based on some agreed criterion such as a social-welfare function, it could (but might not) lead to institutional change(s) at the collective-choice level. In addition, decisions taken at various levels of choice can lead to changes in the composition (i.e.,

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77. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 19–20 (1962); Charles K. Rowley, *Public Choice Economics*, in *THE ELGAR COMPANION TO AUSTRIAN ECONOMICS* 285, 290–91 (Peter J. Boettke ed., 1994).

78. See *infra* note 79 and accompanying text.

attributes) of the community, as some members of the community, for example, might vote with their feet, exercising the option of exit.<sup>79</sup>

Ostrom's IAD framework has proven useful for developing and testing theories and models of social interactions and their consequences for both resource systems and institutions (or, put differently, for coproduced SESs).<sup>80</sup> To a substantial extent, its utility is derived from its compatibility with a wide range of theories, models, and methods.<sup>81</sup> It can accommodate models of bounded as well as complete rationality; it is particularly useful for creating and testing game-theoretic models, in part because of its strong differentiation of actors and institutions. Game theory, a method Ostrom found congenial because it provides predictions that can be tested experimentally in both the laboratory and the field, focuses on strategic decision making by actors in action arenas or situations at all social-choice levels. Among those strategic actors are organizations, which she defines as sets of "institutional arrangements and participants who have . . . common . . . goals and purposes."<sup>82</sup> Their actions are influenced by institutions—in Ostrom's IAD framework, the "working rules," which in game theory are the (often unspecified) factors that determine payoffs<sup>83</sup>—and the outcomes of their interactions (the

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79. See, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21 (1970); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 420 (1956).

80. In recent years, Ostrom and her colleagues at the Workshop in Political Theory and Policy Analysis have shifted focus to an evolving outgrowth of the IAD framework, known as the SES framework, which focuses equal attention on ecological resource systems and human institutional systems, which greatly influence each other and, in effect, coproduce social-ecological outcomes. See John M. Anderies et al., *A Framework to Analyze the Robustness of Social-Ecological Systems from an Institutional Perspective*, 9 ECOLOGY & SOC'Y 18 (2004). The SES framework, which remains a work in progress, is a more complex system based on nested sets of variables and subvariables, which can be deployed in theories and models to explain, more accurately than the IAD framework, the working parts of combined SES. *Id.*; see also Ostrom, *supra* note 73.

81. In Ostrom's methodology, frameworks are the highest, most generally applicable systems. They provide the grammar and structure for constructing subsidiary theories and testable models. See OSTROM, *supra* note 32, at 27–29.

82. Margaret M. Polski & Elinor Ostrom, *An Institutional Framework for Policy Analysis and Design*, WORKSHOP POL. THEORY & POL'Y ANALYSIS, 4 (June 15, 1999), <http://mason.gmu.edu/~mpolski/documents/PolskiOstromIAD.pdf>. But see OSTROM, *supra* note 32, at 57 ("An organization is composed of one or more (usually more) action situations linked together by prescriptions specifying how outcomes from one situation become inputs into others. Organizations may be thought of as a tree or a lattice with situations at each node."). On this conception, "organizations" are neither actors nor institutions, but constellations of action situations. This differs markedly from North's definition of "organization," but is not necessarily inconsistent with his definition of "institution," which Ostrom embraces in the same work.

83. See Daniel H. Cole & Peter Z. Grossman, *Institutions Matter! Why the Herder Problem Is Not a Prisoner's Dilemma*, 69 THEORY & DECISION 219 (2010)



“payoffs”) in turn influence institutions; but the actors are not, themselves, institutions.

Ostrom’s IAD framework has not often been used for the normative purpose of choosing among alternative institutions or sets of institutions and organizations.<sup>84</sup> That has been Komesar’s primary concern—to choose and institutionalize the *best* or *least bad* (that is, lowest-cost) means of dealing with some social-cost problem. Ostrom, by contrast, was primarily interested in *explaining* institutional-choice situations and *predicting* the success or failure of efforts to resolve social dilemmas depending on a wide variety of biophysical and social variables. Her IAD framework is, however, useful for comparative analyses because “success” and “failure” (based on whatever evaluative criteria) are relative concepts that depend on variables including (but not limited to) institutional choices, which are perforce comparable. So, specific applications of Ostrom’s IAD framework (using various theories and models) provide information to decision makers in collective-choice situations about which institutions or sets of institutions are more likely than others to facilitate “good” outcomes (whether defined in terms of resource conservation over time or a broader social-welfare function) in various operational-level action arenas.

For example, a meta-analysis of dozens of specific case studies in *Governing the Commons* allowed Ostrom to develop a set of eight “design principles” for *predicting* the success or failure of that institutional solution in other cases.<sup>85</sup> The more closely conditions in the action situation approximate Ostrom’s “design principles” (a phrase she grew to dislike, but for which she never found a satisfactory alternative), the more likely a common property regime is to succeed. Conversely, the more the situation deviates from the “design principles,” the less likely a common property regime is to succeed.<sup>86</sup> Ostrom’s approach cannot

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(criticizing game theorists who do not pay sufficient attention to the institutions that structure the payoffs in games).

84. Some of Ostrom’s work in the period just prior to elaboration of the IAD framework was directly comparative. For instance, she conducted carefully constructed (and subsequently replicated) large-n field studies comparing the performance of consolidated (large) and polycentric (small and medium) municipal police departments, finding that the then-standard assumption of economies of scale from consolidation of small departments was generally unwarranted. See Elinor Ostrom & Gordon P. Whitaker, *Community Control and Government Responsiveness: The Case of Police in Black Neighborhoods*, in *IMPROVING THE QUALITY OF URBAN MANAGEMENT* 303 (Willis D. Hawley & David Rogers eds., 1974) [hereinafter Ostrom & Whitaker, *Community Control*]; Elinor Ostrom & Gordon Whitaker, *Does Local Community Control of Police Make a Difference? Some Preliminary Findings*, 17 AM. J. POL. SCI. 48 (1973).

85. See OSTROM, *supra* note 34, at 89–102.

86. For a large-scale empirical study supporting Ostrom’s “design principles,” see Michael Cox et al., *A Review of Design Principles for Community-Based Natural Resource Management*, 15 ECOLOGY & SOC’Y 38 (2010).

predict whether private-property or public-property/regulatory solutions (however defined) necessarily would be any more or less successful in cases where the “design principles” are generally satisfied, but on the principle of subsidiarity implicit in the Ostroms’ polycentric approach to social policy making, local solutions should be preferred to solutions from more distant social choice forums, whenever the “design principles” generally are satisfied (all else being equal).<sup>87</sup> In many cases at least, this presumption seems likely to be consistent with a Coasean comparative transaction-cost analysis and, therefore, with Komesar’s approach to CIA.<sup>88</sup>

Indeed, Ostrom’s approach might even provide a basis for bridging the gulf that seemingly separates Komesar’s approach to CIA from North’s approach. Specifically, although Ostrom (for the most part) follows North’s restrictive definition of “institution,” her conception of “action arenas” seems to match Komesar’s predominant concern with decision-making processes as the focal points of analysis. For example, a legal dispute in a courtroom is a decision-making process for Komesar and an action arena for Ostrom. If we treat Komesar’s decision processes as action arenas, it becomes possible to separate out institutions as the rules that structure interactions and decisions in the judicial action arena, as well as the outputs of decisions emerging from the judicial action arena, rather than treating the adjudicatory process itself as an institution.

Even if Ostrom does not completely bridge the difference between Komesar and North,<sup>89</sup> her approach to institutional analysis cannot be adjudged better or worse than any other, except on an inherently subjective valuation of the utility of alternative approaches for

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87. See, e.g., OSTROM, *supra* note 32, at 281–86 (addressing the comparative advantages and limits of polycentric systems); Vincent Ostrom et al., *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 AM. POL. SCI. REV. 831, 832, 837–38, 842 (1961).

88. As Alexis De Tocqueville put it, “the collective strength of the citizens will always be more powerful for producing social well-being than the authority of the government.” ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 153 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010) (1835). Tocqueville obviously was not contemplating problems of externality or potential scale economies in governance. The most efficient level of governance always depends on a variety of cost factors, but Elinor Ostrom’s empirical research suggests that claims of scale economies in governance are often exaggerated and sometimes false. See, e.g., Ostrom & Whitaker, *Community Control*, *supra* note 84. See generally Richard C. Feiock, *A Transaction Cost Theory of Federalism* (Fla. State Univ., Program in Local Governance Working Paper, n.d.), available at [http://localgov.fsu.edu/readings\\_papers/readings\\_miscellaneous.htm](http://localgov.fsu.edu/readings_papers/readings_miscellaneous.htm).

89. Ostrom never applied her IAD framework to study legal action situations per se. And it is not obvious how that framework might confront social choices among alternative action arenas, which is of course of central concern to Komesar.

understanding how humanly devised systems function,<sup>90</sup> and the extent to which that understanding facilitates “better” (defined in accordance with some evaluative criteria) social choices among institutional alternatives.

Komesar and Ostrom have both contributed greatly to the development of CIA in their respective domains of scholarly interest. Their approaches have provided immensely important and useful insights not just for policy makers and policy analysts but for future generations of scholars, who will continue to build on the foundations they have established, whether by trying to consolidate and unify their approaches or simply by extending and/or improving upon their respective approaches to institutional analysis.

#### CONCLUSION

Neil Komesar has written that he has spent decades in a “wilderness” (albeit a pleasant one), apart from mainstream legal scholarship, pursuing his sometimes lonely quest to improve institutional analysis for legal-policy choice.<sup>91</sup> I suspect many, if not most, other interdisciplinary scholars have similar feelings of alienation from their home disciplines. What I have tried to show in this Article is that Komesar actually has many friends among the various social sciences, who have been working on more or less compatible approaches to CIA, while Komesar has been plowing his lonely furrow in the legal academy. An ever-increasing number of sociologists, international studies scholars, anthropologists, economists, political scientists, public-policy analysts, and even a few other legal scholars have, over the past decades, developed and applied various approaches to CIA. Many universities today offer courses in institutional analysis, using a variety of texts,

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90. In this context, a “system” may be defined as an equilibrium set of (Northian) institutions and organizations.

91. Neil K. Komesar, *The Logic of Law and the Essence of Economics: Reflections on 40 Years in the Wilderness*, 2013 WIS. L. REV. 265. Interestingly, for much of their careers Elinor and Vincent Ostrom felt alienated from their fellow political scientists, who for a long time grossly underestimated the value of their research approach and scholarly contributions. See, e.g., Elinor Ostrom, *A Long Polycentric Journey*, 13 ANN. REV. POL. SCI. 1, 2 (2010) (“My research interests took me down a long and interdisciplinary path to the study of complex social-ecological systems—a path that many colleagues in political science strongly criticized. . . . A political scientist was expected to study the parliaments or bureaucracies of national or international regimes and not the design, operation, and adaptation of rule systems at lower levels.”). They founded the Workshop in Political Theory and Policy Analysis at Indiana University in 1973, in part, as an interdisciplinary haven from the academic confines of their home department (political science).

including specialized textbooks and handbooks,<sup>92</sup> which usually incorporate a sizeable comparative element. Some of these books also cross disciplinary boundaries and compare alternative approaches to institutional analysis.<sup>93</sup>

The need remains for more and better communication among scholars who use one or another form of CIA in various disciplines, not necessarily to develop a single, unified theory and approach to CIA, but at least to compare notes and learn from one another. It is long past time that scholars from across academic disciplines started talking more with one another to probe both common ground and differences in both goals and methods.<sup>94</sup>

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92. See, e.g., THE OXFORD HANDBOOK OF COMPARATIVE INSTITUTIONAL ANALYSIS (Glenn Morgan et al. eds., 2010); SCOTT, *supra* note 21.

93. See, e.g., SCOTT, *supra* note 21.

94. Indiana University is home to a nearly forty-year-old center devoted to just such interdisciplinary endeavors: the Vincent and Elinor Ostrom Workshop in Political Theory and Policy Analysis. On the importance and difficulties of interdisciplinary cooperation, based largely on lessons learned over more than three decades of collaboration and contestation at the Ostrom Workshop, see AMY R. POTEETE, MARCO A. JANSSEN & ELINOR OSTROM, WORKING TOGETHER: COLLECTIVE ACTION, THE COMMONS, AND MULTIPLE METHODS IN PRACTICE (2010).